Supreme Court, U.S.
FILED
OCT 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-414

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1990 TERM

MUMTAZ BANO KHAN,
Petitioner

V.

JIMMY R. JENKINS, JOHN H. CARSON, MARION D. THORPE, ELIZABETH CITY STATE UNIVERSITY,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

LACY H. THORNBURG
Attorney General

Thomas J. Ziko
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7387
ATTORNEYS FOR RESPONDENTS

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. MUST AN ASIAN AMERICAN FACULTY MEMBER PROVE THAT SHE IS AS QUALIFIED AS HIGHER PAID BLACK FACULTY IN ORDER TO MAKE OUT A PRIMA FACIE CASE OF DISCRIMINATION IN SALARY UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 OR THE FOURTEENTH AMENDMENT?

II. DOES A DISTRICT COURT JUDGE HAVE THE DISCRETION TO DENY A PLAINTIFF FURTHER DISCOVERY WHEN THE PLAINTIFF FAILS TO COMPLY WITH THE COURT'S DISCOVERY ORDERS?

III. IS A PLAINTIFF ENTITLED TO A NEW TRIAL ON GROUNDS THAT SHE WAS DENIED FURTHER DISCOVERY OF HER EMPLOYER'S EMPLOYMENT RECORDS DESPITE THE FACT THAT THE DECISION TO DENY HER ACCESS TO THOSE RECORDS WAS HARMLESS?

III. IS AN ASIAN AMERICAN PLAINTIFF ENTITLED TO INTRODUCE STATISTICAL EVIDENCE WHICH INDICATES DISPARITIES IN THE SALARIES PAID BLACK AND NON-BLACK FACULTY WHEN (1) THOSE DISPARITIES ARE NOT LEGALLY SIGNIFICANT DURING THE RELEVANT PERIOD AND (2) THE PLAINTIFF'S STATISTICAL EVIDENCE SHOWED NO STATISTICALLY SIGNIFICANT DISPARITY IN THE SALARIES PAID BLACK AND ASIAN AMERICAN FACULTY?

IV. DID THE TOTALITY OF THE PLAINTIFF'S EVIDENCE RAISE AN INFERENCE OF RACE DISCRIMINATION SUFFICIENT TO OVERCOME THE DEFENDANTS' MOTION TO DISMISS?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

In this case the petitioner, an Asian American and a former member of the Elizabeth City State University (ECSU) Department of Business and Economics, claimed that the respondents, ECSU, Dr. Jimmy Jenkins, ECSU Vice-Chancellor for Academic Affairs, and Dr. John Carson, Chairman of the ECSU Department of Business and Economics, denied her a higher salary because of her race in violation of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and the fourteenth amendment and 42 U.S.C. § 1983. Petitioner's claims against respondent Dr. Thorpe were dismissed before trial on grounds that petitioner had failed to file a claim against his estate following his

death. At trial the district court granted respondents' motions to dismiss at the conclusion of the petitioner's evidence on grounds that the petitioner had failed to make out a prima facie case of race discrimination. (Appendix to Petition, 29-40; hereinafter App. __). The United States Court of Appeals for the Fourth Circuit subsequently affirmed that decision. (App. 3-27).

SUMMARY OF ARGUMENTS

In this brief the respondents argue that the Court should not grant the petition for writ of certiorari because the petitioner has failed to show that the decision below is in conflict with any applicable decision of this Court or any other circuit and has failed to show any other special or important reason for granting the writ.

I.

The court of appeals properly adapted the prima facie case described in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) to the allegations and employment practice at issue in this case. In particular, given the fact that the case involved allegations of discrimination in the salaries paid university faculty, the court of appeals properly required petitioner to prove as one element of her prima facie case that she was paid less than other faculty comparably qualified in terms of education and rank. Although the petitioner claims that the court of appeals' description of the applicable prima facie case is in conflict with that used in other circuits, review of the allegedly conflicting precedents shows that those decisions did not involve professional personnel. Moreover, proof the the petitioner was paid less than Black faculty comparably qualified in terms of education and rank is necessary to eliminate the most common reasons for differences in salaries paid university faculty.

II.

The court of appeals did not err when it affirmed the district court's decision to deny the petitioner further discovery. The proper standard for review of discovery decisions is abuse of discretion. The respondents show the Court that, given the extensive discovery granted the petitioner, the petitioner's failure to comply with the district court's order regarding further discovery, the petitioner's belated attempts to compel further discovery and the petitioner's failure to show that the district court's decision to deny her further discovery limited her ability to develop her statistical evidence, the court of appeals did not err in affirming the district court's decision to deny the petitioner further discovery. The precedents which the petitioner claims to be in conflict with this decision do not present the same issues.

III.

The court of appeals properly affirmed the district court's decision to sustain Dr. Jenkins' and Dr. Carson's objections to the admission of the petitioner's statistical evidence in her claims against them in their individual capacities under 42 U.S.C. § 1983. The court of appeals properly reviewed all the statistical evidence in the context of the facts and issues presented in the case before affirming the district court decision. *See, Watson v. Fort Worth Bank and Trust,* 487 U.S. 977 at 995 n.3 (1988)(statistical evidence must be evaluated on a case-by-case basis). The petitioner's statistical evidence covered the period from 1971-72 to 1979-80. However, the petitioner's claim that she was discriminated against in the years prior to 1979-80 were time barred. In order to prevail in this case, the petitioner was under an obligation to prove that the individual defendants discriminated against her during the 1979-80 academic year, her last at ECSU. Dr. Jenkins and Dr. Carson were not responsible for setting faculty salaries until after the 1977-78 academic year. The statistical evidence for the years 1978-79 and 1979-80 did not reveal a statistically significant difference in the salaries paid Asian and Black

Asian and Black faculty. Moreover, the statistical evidence showed that the difference between the salary paid the petitioner and that paid a hypothetically similarly situated Black member of the ECSU faculty was never statistically significant. Although some of the petitioner's statistics showed larger disparities between the relative salaries paid Blacks and non-Blacks, these disparities were not statistically significant during the relevant period. Furthermore, that evidence was not as pertinent as the statistical evidence regarding the relative salaries paid Asians and Blacks. Given those facts, the court of appeals did not err when it determined that the district court did not abuse its discretion when it sustained the individual respondents' objections to the petitioner's statistical evidence.

IV.

The court of appeals did not err when it determined that the record as a whole did not prove a prima facie case against any of the respondents. In this argument, the respondents show the Court that considered in its entirety the statistical evidence was insufficient to raise an inference of discrimination, that the petitioner failed to show that she was paid less than any comparably qualified Black faculty members, and that the petitioner failed to show that the respondents discriminated against the petitioner or any other Asian faculty member in any of their employment decisions.

REASONS WHY WRIT SHOULD NOT ISSUE

I. THE COURT OF APPEALS APPLIED THE PROPER STANDARD FOR DETERMINING WHETHER THE PETITTIONER HAD ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION IN SALARY.

The petitioner claimed that the respondents discriminated against her in terms of her salary in violation of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1983. At the conclusion of the petitioner's evidence, the district court granted the respondents' motions to dismiss on grounds that the petitioner had failed to establish a prima case of discrimination. The court of appeals affirmed that decision. The petitioner now claims that the Court should review that decision on grounds that the court of appeals' description of the elements of a prima facie case of salary discrimination differ from those required by other circuits. An examination of the court of appeals' decision shows that it properly defined the petitioner's initial burden of proof and that any differences between the prima facie case described in the court of appeals' decision and that described by other circuits does not merit this Court's review.

In *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) this Court first described the now familiar four step proof which permits a plaintiff to establish a prima facie case of discrimination without direct proof of discrimination. In *McDonnell Douglas* this Court held that when the plaintiff alleges he was denied employment in violation of rights secured under Title VII he may establish a prima facie case "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.* at 802. If the plaintiff proves these elements, he satisfies his initial

obligation to present sufficient circumstantial evidence to show that the decision to deny him employment or some benefit of employment "did not result from the two most common legitimate reasons on which an employer might rely to reject a job application: an absence or relative lack of qualifications or absence of a vacancy in the job sought." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n. 4 (1977).

The specific elements of a *McDonnell Douglas* prima facie vary depending on the particular fact situation and employment practice at issue. *McDonnell Douglas v. Green*, 411 U.S. 792 at 802 n. 3. In the context of alleged salary discrimination, the Fourth Circuit Court of Appeals has held that proof of a *McDonnell Douglas* prima facie case requires not only proof of a disparity between salaries paid employees of different races but also proof that the plaintiff was equally qualified to receive the higher salary. *Bazemore v. Friday*, 751 F.2d 662, 670 (4th Cir. 1984), *rev'd per curiam on other grounds*, 478 U.S. 385 (1986). Therefore, under the Fourth Circuit's decisions, the plaintiff who seeks to establish a *McDonnell Douglas* prima facie case of salary discrimination must present evidence "to show: (1) that she is a member of a protected class; (2) that she is as qualified as employees not of the protected class; and (3) that she was paid less than these other comparably qualified employees." (App. 15).

The Fourth Circuit's emphasis on the plaintiff's obligation to prove her relative qualifications for a higher salary is entirely consistent with this Court's holding in *McDonnell Douglas*. The purpose of the prima facie case as described in *McDonnell Douglas* is to eliminate the most common legitimate reasons for an employment decision. *See, International Brotherhood of Teamsters v. United States*, 431 U.S. at 358 n. 4 (1977). Absent evidence of her relative qualifications for the higher salary the plaintiff must necessarily fail to carry her initial burden of proving that her employer's salary decisions did not result from the most common legitimate reasons on which an employer might

rely to pay employees different salaries, i.e. a difference in their relative qualifications. *Id.* In fact, this Court has implicitly recognized that proof of one qualification, i.e., that the plaintiff held a position comparable to the favored white employee, is a necessary element of a prima facie case of salary discrimination. *Bazemore v. Friday*, 478 U.S. 385, 403 (1986)(Brennan, J., concurring).

The petitioner claims that to prove her prima facie case of discrimination in salary she should only need to prove that she was paid less for performing substantially the same job as persons of a different race. The petitioner claims that to the extent that the Fourth Circuit requires more, its decision is in conflict with the decisions in *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425 (5th Cir. 1984), *Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071 (5th Cir. 1981), and *Katz v. School District of Clayton, Mo.*, 557 F.2d 153 8th Cir. 1977). Examination of those decisions does not support the petitioner's claim.

First, an examination of those cases shows that, unlike the petitioner in this case, none of the plaintiff's were college faculty. In *Uviedo* the plaintiff was a clerical worker, in *Pittman* the plaintiff was a printer, and in *Katz* the plaintiff was a teacher's assistant. When a discrimination claim is brought by a nonprofessional employee, one might reasonably assume that the only qualification for a particular salary would be the ability to do the same work. In academia, however, all faculty teach, conduct research and serve on committees. Under those circumstances, one's salary is dependent not on the type of work performed, but rather on one's education, experience, rank, performance and field of expertise. *Cf., Bazemore v. Friday*, 478 U.S. at 398-401 (probative value of salary regression analysis extension service personnel dependent on control for factors such as education, job title, tenure and job performance). In fact, the petitioner's own expert found a positive correlation in this case between a faculty member's time in service and rank.

Therefore, to the extent that the cases cited by petitioner describe a different prima facie case for claims of discrimination in salary under Title VII and 42 U.S.C. § 1983, that difference can be ascribed to the fact that the cases did not involve college faculty. In fact, failure to account for differences in setting salaries of professional and nonprofessional employees would be contrary to this Court's note in *McDonnell Douglas v. Green*, 411 U.S. 792 at 802 n.3, that the elements of a Title VII prima facie case will necessarily vary in differing factual situations.

Aside from the fact that the present case involves professional personnel, the cases cited by the petitioner can be distinguished on other grounds. *Katz*, for example, did not involve a claim under either Title VII or 42 U.S.C. § 1983. Instead, the plaintiff in *Katz* alleged a violation of her rights under the Equal Pay Act, 29 U.S.C. 206, *et seq*. *Pittman* and *Uviedo* involved Title VII claims but the courts relied upon Equal Pay Act precedents when stating the elements of a prima facie case for salary discrimination. There is a significant difference between a claim under the Equal Pay Act and a claim under Title VII and the courts' failure to account for that difference when describing the elements of a prima facie case caused them to stray from the principles of *McDonnell Douglas*.

In an action brought under the Equal Pay Act the plaintiff's only burden is to prove that she was paid less than a man "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). Once the Equal Pay Act plaintiff carries that burden, the employer has the burden of proving that the wage differential was based on some factor other than sex. *Id.* at 197. These burdens differ significantly from a disparate treatment claim under Title VII or an equal protection claim under 42 U.S.C. § 1983. In those cases, the plaintiff bears the burden of proving

that she has been the victim of intentional discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Washington v. Davis*, 426 U.S. 229 (1976); and *Arlington Heights v. Metropolitan Bus Inc.*, 429 U.S. 252 (1977).

In light of this greater burden of proof, the plaintiff in a Title VII action or a 42 U.S.C. § 1983 action must present sufficient evidence in her prima facie case to create an inference of intentional discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254 (1981). As this Court noted in *Burdine* and *International Brotherhood of Teamsters*, this inference does not arise until the plaintiff has presented at least enough evidence to eliminate the most common nondiscriminatory reasons for the employer's actions. In the context of the salary paid university faculty that proof must include something more than the fact that the plaintiff was employed as a faculty member. Otherwise, a plaintiff's prima facie case would fail to eliminate any of the most common reasons for the differences in faculty salaries. Consequently, even if there is a conflict between the prima facie case as described in the Fourth Circuit's opinion and that described in the cases cited by the petitioner, the Fourth Circuit's formulation is more faithful to the holding and principles of *McDonnell Douglas*.

The petitioner's argument that the court of appeals' decision imposed an unnecessarily heavy burden on her fails to account for several significant differences between the circumstances of her employment and those of her allegedly comparable colleagues in the Business and Economics Department during the 1979-80 academic year.

Petitioner claims that the disparity between her salary and that of Ms. Roberts, a Black female, is indicative of discrimination. The record, however, shows that after being hired Ms. Roberts attended the University of North Carolina at Greensboro where she completed thirty semester hours of study beyond her masters degree. (App. 19). After completing those courses in the

summer of 1979, Ms. Roberts was promoted to Assistant Professor. (App. 19).

Ms. Roberts' record stands in sharp contrast with petitioner's. During the time she was employed at ECSU, petitioner did not attend an accredited institution and made no effort to continue her education until 1976 when she enrolled in a correspondence Ph. D. program at California Western University. (App. 7). While enrolled in California Western University, petitioner did not take thirty semester hours of study and, in fact, received academic credit for her "life experiences." (App. 7). Furthermore, petitioner failed to provide the ECSU administration with an official transcript of her studies at California Western University until after she left ECSU. (App. 7). Without thirty semester hours of study beyond the masters degree, petitioner did not qualify for promotion. (App. 7). Consequently, in order to continue Ms. Khans employment for the 1978-79 academic year, Dr. Jenkins had to demote her from Instructor to Lecturer. (App. 7).

In the spring of 1979, Dr. Carson recommended petitioner's nonreappointment in part because she had failed to earn additional academic credit beyond her masters. Dr. Jenkins accepted that recommendation and in accordance with ECSU regulations issued petitioner a terminal contract for the 1979-80 academic year. (App. 8).

Thus, during the year in question, 1979-80, Ms. Roberts had just been promoted and was serving in her first year as an Assistant Professor. Petitioner, on the other hand, had been demoted the year before and was serving out her final year on the faculty. Given these fundamental dissimilarities between Ms. Roberts and petitioner, the $2686 difference in their 1979-80 salaries will not support an inference of discrimination in salary because it fails to account for common reasons for differences in faculty salaries, i.e rank and performance.

Petitioner's attempt to establish a prima facie case by comparing her salary in 1979-80 to that paid Mr. Dandeson Panda, a Black male first hired in the department for the 1979-80 academic year, also fails. By 1979-80 petitioner had been demoted to Lecturer, a nontenure track position, whereas Mr. Panda was hired that year as an Instructor, an entry level tenure track appointment. (App. 19 and 31). Finally, aside from the fact that Mr. Panda had an M.B.A., petitioner failed to present any evidence which would permit one to determine that she and Mr. Panda were similarly qualified. Therefore, the comparison of petitioner's salary with Mr. Panda's salary fails to create an inference of discrimination.

In summary, the court of appeals properly held that, at least in the context of university faculty, a prima facie case of salary discrimination requires proof that the plaintiff was paid less than "other comparably qualified employees." (App. 15). Furthermore, applying that standard to the facts in the record, the court of appeals properly held that the petitioner had failed to prove that she was paid less than any comparably qualified faculty member. Therefore, this issue does not merit this Court's review.

II. THE DISTRICT COURT'S DECISIONS TO DENY THE PLAINTIFF'S BELATED REQUESTS FOR DISCOVERY AND MOTIONS TO COMPEL AND THE COURT OF APPEALS' DECISION TO AFFIRM THOSE RULINGS DO NOT RAISE ISSUES THAT MERIT THIS COURT'S REVIEW.

The petitioner complains that the court of appeals erred when it affirmed the district court's decisions to deny her further discovery in this case. A review of the whole record shows that there are no special or important reasons for the Court to review the court of appeals' decision on this issue.

During the early course of this litigation, the petitioner served several identical requests for production of documents on the respondents. In those requests she demanded that the respondents produce a massive number of personnel records for the period from 1970 through 1982. In response to the first of those requests, the respondents filed a motion for protective order on April 6, 1983. Between that time and April 11, 1985, the parties engaged in extensive litigation regarding the timeliness of the petitioner's complaint. (App. 9-10). The only cause of action to survive that litigation was petitioner's claim that she had been denied a salary equal to similarly employed men because of her sex in violation of her rights under the Equal Pay Act, 29 U.S.C. § 206, *et seq.*, for the period from December 31, 1979 through May 30, 1980. (App. 10).

Once the complaint had been reduced to that single cause of action, the respondents filed a response to the petitioner's request for production of documents. In that response, the respondents agreed to produce for inspection and copying a large volume of material relevant to petitioner's claim of sex discrimination under the Equal Pay Act. The respondents, however, objected to petitioner's request for documents which noted the race, national origin and citizenship of ECSU faculty members on grounds that, insofar as the Equal Pay claim was limited to alleged sex discrimination, the request exceeded the scope of discovery under Rule 26, F.R. Civ. Pro.

The respondents' objections to discovery were first considered during a pre-trial hearing held on May 8, 1985. At the conclusion of that hearing, the magistrate entered a comprehensive pre-trial order in which he ordered the respondents to produce some additional documents and denied the petitioner's request for other documents. Petitioner initially appealed the magistrate's order to the district court judge. Before that appeal could be heard, however, petitioner, who had been proceeding *pro se* since June of 1984, retained new counsel. After retaining counsel,

petitioner withdrew her appeal of the magistrate's order and it was dismissed as moot.

During a second pre-trial conference held on November 12, 1985, petitioner filed a motion to reconsider the previous rulings on discovery. That motion was denied on grounds that it reiterated numerous matters that the court had previously ruled on and on grounds that it was not timely. Despite the fact that she was represented by counsel, petitioner personally filed a motion to compel discovery on November 26, 1985, approximately a week before the scheduled trial on her Equal Pay Act claims. That motion was denied on grounds that it lacked merit and was not signed by local counsel in violation of Local Rule 2.04 (E.D.N.C.).

The parties then settled petitioner's Equal Pay Act claims. (App. 10). That settlement disposed of the last remaining claim in petitioner's complaint. Therefore, the district court entered judgment on its earlier orders granting the respondents' summary judgment on petitioner's other claims of race, sex and national origin discrimination under Title VII, 42 U.S.C. § 1981 and 42 U.S.C. §1983 and petitioner gave notice of appeal. On appeal, the court of appeals affirmed in part and reversed in part and remanded for trial petitioner's claims that the respondents had discriminated against her on the basis of her race, sex and national origin in terms of her salary and work assignments in violation of Title VII, 42 U.S.C. § 1981 and 42 U.S.C. §1983. Thus, for the first time since the respondents had filed their motion for protective order on April 6, 1983, the respondents did not have a pending objection to petitioner's efforts to pursue discovery on a pending claim of race and national origin.

On March 24, 1988, petitioner filed a motion in which she not only requested leave to conduct further discovery but also asserted that the respondents had not "fully responded to motions to produce and interrogatories herein earlier served upon them." (App. 73) In fact, prior to that date the petitioner had not filed

any interrogatories on any of the respondents. In light of the protracted history of the case and the fact that the petitioner had already been given abundant discovery, the magistrate denied petitioner's request for "a carte blanche discovery order." (App. 46). Instead, the magistrate directed petitioner to submit for the court's approval "a proposed discovery schedule setting forth with specificity the discovery desired, including the number of interrogatories and requests for production and certification of counsel that it is not duplicative of any prior discovery request." (App. 47).

On May 9, 1988, petitioner submitted a proposed discovery schedule. (App. 48-50). That proposed schedule did not comply with the magistrate's order in that it did not set forth with specificity the requested discovery or certify that the requests would not be duplicative of earlier requests. Counsel for petitioner made no attempt to explain why such a certification was not appropriate or why additional discovery was needed. In light of petitioner's failure to comply with his earlier order, the magistrate denied the motion for additional discovery. (App. 51-52). Petitioner appealed that ruling but the district court judge subsequently affirmed the magistrate's decision on June 7, 1989. (App. 53-54).

More than nine months later, after the case had been set for final pre-trial conference and trial, petitioner, without seeking leave of the court, filed a motion to compel discovery, requests to produce, requests for admission and her first set of interrogatories. The parties presented their positions on these belated attempts to secure additional discovery to the magistrate during the pre-trial hearing on April 18, 1989. At the conclusion of the pre-trial hearing, the magistrate entered an order denying the petitioner's motion to compel and her requests for additional discovery. (App. 26). The magistrate expressly found that the petitioner's efforts to secure additional discovery were not timely and would have prejudiced the respondents' preparation of their defense. He also found that the petitioner's discovery requests had been addressed

in no fewer than five previous orders and denied the petitioner's request to reconsider those rulings at that late date. The district court judge subsequently affirmed the magistrate's ruling.

The court of appeals affirmed this decision on grounds that the petitioner had failed to clearly prove that the trial court's decision to deny her belated discovery requests and motion to compel constituted an abuse of discretion. (App. 26). The court of appeals further found that the respondents had provided the petitioner with sufficient material to permit her to develop and present at trial extensive statistical analysis of salaries paid male, female, White, Black and Asian faculty at ECSU. (App. 27 n.9 and 61-72). In light of that fact, the court of appeals found that any error in the district court's decision to deny the petitioner further discovery was harmless. (App. 26).

The petitioner now contends that the court of appeals' decision in this case is in conflict with the decisions in other circuits. In support of this claim the petitioner cites decisions which emphasize Title VII plaintiffs' rights to discover employment data relevant to the development of statistical evidence. The decision in this case, however, does not address the issue of whether Title VII plaintiffs are entitled to broad discovery of employment records. Neither the respondents nor the court of appeals disputed either the petitioner's need for or right to discover relevant employment data. The issue before the court of appeals was whether the trial court had abused its discretion when it ordered the petitioner to submit an appropriate discovery schedule, including a certification that the proposed discovery requests would not be redundant, whether the petitioner failed to comply with the orders on discovery and the harmlessness of the alleged error. An examination of the opinions on which the petitioner relies reveals no conflict on those issues.

In both *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 304 (5th Cir. 1973) and *Trevino v. Celanese Corp.*, 701 F.2d 397, 406 (5th Cir. 1983) the Fifth Circuit Court of Appeals emphasized

the trial court's broad discretion in matters of discovery. A notable factor in both cases was absence of a written record of the trial court's reasons for denying the plaintiffs' discovery requests. *Burns v. Thiokol Chemical Corp.*, 483 F.2d at 304; *Trevino v. Celanese Corp.*, 701 F.2d at 406. Moreover, neither case involved untimely discovery requests or the plaintiff's failure to comply with the trial orders regarding discovery. Finally, the opinions indicate that the plaintiffs in those cases were denied all access to the information they needed to conduct their statistical analyses. *Id.* Therefore, those cases are distinguishable from the present case in which the court of appeals specifically found that the petitioner had ample discovery and information to conduct extensive statistical analysis of the salaries paid ECSU faculty. Therefore, the Fifth Circuit's decisions in *Burns* and *Trevino* are not inconsistent with the Fourth Circuit's decision in this case.

Both *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1362 (9th Cir. 1985) and *Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980) involved cases where the plaintiff was denied all access to the defendants' employment data. In *Weahkee v. Norton*, 621 F.2d at 1083, the Tenth Circuit specifically found that the failure to provide the plaintiff with the relevant discovery was not shown to be harmless. Of course, in the case at bar the fact that the respondents did provide the petitioner with substantial employment data led the Fourth Circuit to hold to the contrary. Furthermore, there is no indication in either *Diaz* or *Weahkee* that the plaintiffs had failed to comply with the trial court's orders on discovery. Consequently, neither the Ninth Circuit's decision in *Diaz* nor the Tenth Circuit's decision in *Weahkee* conflicts with the Fourth Circuit's decision in this case. Absent such a conflict this issue does not merit the Court's review.

III. WHETHER THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DECISION TO EXCLUDE THE PLAINTIFF'S STATISTICAL EVIDENCE ON HER CLAIM AGAINST THE INDIVIDUAL RESPONDENTS UNDER 42 U.S.C. § 1983 IS NOT AN ISSUE WHICH MERITS THIS COURT'S REVIEW.

On May 27, 1980, petitioner filed a charge with the EEOC in which she complained that the respondent ECSU discriminated against her in terms of her salary in violation of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. On December 30, 1982, the petitioner filed her complaint in the Eastern District of North Carolina in which she alleged that the institutional respondent ECSU and the individual respondents Dr. Jenkins and Dr. Carson discriminated against her in violation of her rights under Title VII, the fourteenth amendment and 42 U.S.C. § 1983.

In accordance with the 180 day filing requirement set out in 42 U.S.C. § 2000e-5 and North Carolina's three year statute of limitation for actions under 42 U.S.C. § 1983, petitioner was obligated to prove that the paychecks she received no earlier than December 1979 were the product of a deliberately discriminatory decision on the part of Dr. Jenkins or Dr. Carson or were a continuation of a previously discriminatory salary decision by ECSU.

In an attempt to prove that the respondents discriminated against her on the basis of her sex or race when setting her salary, the petitioner offered a statistical study of salaries paid ECSU faculty from the 1971-72 academic year through the 1979-80 academic year. A portion of that study is reproduced in the Appendix to the Petition. The district court sustained the individual respondents' objections to the admission of this evidence and excluded this evidence on the petitioner's § 1983 claim against Dr. Jenkins and Dr. Carson. The district court, however, overruled

ECSU's objection to the statistical study and accepted that evidence on the petitioner's Title VII claim. The court of appeals affirmed that decision.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 at 340 (1977), the Court emphasized that statistics "come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." More recently, in *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), the Court reiterated its concern over the indiscriminate use of statistics. After holding that "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question [was discriminatory]," *Id.* at 994, the Court noted that, in the absence of any consensus on the proper mathematical standard for determining the legal "significance" or "substantiality" of statistics, the probative value of statistical evidence must be evaluated on a case-by-case basis. *Id.* at 995 n.3.

The statistical evidence petitioner offered at trial did not tend to prove that either Dr. Jenkins or Dr. Carson deliberately discriminated against her in setting her salary for the 1979-80 academic year. Petitioner's statistical expert, testified that a P value of 0.05, or two standard deviations is the conventional cut off for statistical significance. The Fourth Circuit, however, has generally cautioned lower courts against drawing any legal conclusions from standard deviations in the range of one to three. *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 647-48 (4th Cir. 1983); *Moultrie v. Martin*, 690 F.2d 1079, 1082-83 (4th Cir. 1982); *EEOC v. American National Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981). This rule is consistent with the Court's discussion of statistical significance in *Watson v. Fort Worth Bank and Trust*, 487 U.S. at 995 n.3.

Petitioner's evidence showed that there was no statistically significant difference at the level of two standard deviations between the salaries paid Asians and Blacks during the years 1978-79 or 1979-80. (App. 23, 33, 38, 70 and 71). Furthermore, the statistical analysis of petitioner's actual salary showed that it was never more than two standard errors lower than that for a theoretically, similarly situated Black faculty member. (App. 72). In fact, the evidence showed that for the years 1978-79 and 1979-80 petitioner's salary was only 0.24 and 0.19 standard errors lower than that for a theoretically, similarly situated Black faculty member. (App. 72). Obviously, this evidence did not tend to prove that Dr. Jenkins or Dr. Carson discriminated against petitioner on grounds of her race or national origin when setting her salary during the 1979-80 academic year.

Petitioner's study did indicate that there was a statistically significant difference between the salaries paid Asians and Blacks during the years 1973-74 through 1977-78 (App. 65-69) and a statistically significant difference between the salaries paid non-Blacks and Blacks during the years 1972-73 through 1977-78 and 1979-80. (App. 64). These figures, however, were based on the salaries paid all the faculty at ESCU. Petitioner made no attempt to present a statistical analysis of salaries paid faculty in the Department of Business and Economics.

This evidence was plainly irrelevant to petitioner's claim against Dr. Carson. Dr. Carson was appointed chairman of the Department of Business and Economics in 1977. (App. 23). He testified that his only responsibility for salaries was to make recommendations for merit raises for faculty in the Department in accordance with the budget appropriations. Consequently, any evidence of discrimination based on salaries paid faculty outside the Department of Business and Economics or paid faculty before

the time Dr. Carson became chairperson was irrelevant to petitioner's claims against Dr. Carson and unduly prejudicial to his defense.

The evidence showed that Dr. Jenkins became ECSU Vice Chancellor for Academic Affairs in July 1977. (App. 23) There is no evidence of the exact role he played in setting salaries in that year, or indeed, in any subsequent year. Dr. Carson testified that as department head he recommended salaries which were subject to administrative approval. If that testimony is extrapolated to the other academic departments, at most the record shows that as Vice Chancellor Dr. Jenkins was responsible for reviewing the departmental recommendations for salary increases. Consequently, evidence of a statistically significant disparity between the salaries paid all Asians and Blacks during the year 1977-78 does not indicate that Dr. Jenkins was personally motivated to discriminate against Asians.

Furthermore, petitioner had the burden of proving that Dr. Jenkins discriminated against her in terms of her salary during the year 1979-80. Evidence of racial discrimination in overall salaries in the year 1977-78 is not particularly probative on that issue. The probative value of this evidence becomes even more attenuated when one considers that after Dr. Jenkins became Vice Chancellor the salary differential between Asians and Blacks became statistically insignificant. (App. 70 and 71).

The statistical evidence did show that there was a significant difference at the three standard deviation level between the salaries paid Blacks and non-Blacks during the year 1979-80. (App. 64 and 71). The court of appeals, however, discounted this evidence on grounds that statistical disparities in the range of one to three standard deviations are not necessarily legally sufficient to create an inference of discrimination. (App. 21 n.6).

Despite this evidence, the petitioner claims that the lower courts erred when they found the statistical evidence regarding the disparities between salaries paid Blacks and non-Blacks was not relevant to her claim that she had been discriminated against because she was Asian. The petitioner's argument ignores the fact that the statistical evidence regarding the relative salaries paid Blacks and Asians and relative salary paid petitioner and a hypothetically, similarly situated Black faculty member failed to support her claim of discriminatory treatment. (App. 21 n.6 and 23 n.9).

The decision to admit expert statistical evidence lies within the sound discretion of the trial judge and should not be disturbed on appeal absent proof of abuse of that discretion. *Herold v. Hajoca Corp.*, 864 F.2d 317, 321 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 3159, 104 L. Ed. 2d 1022 (1989); App. 24. In exercising that discretion the trial court may consider not only the probative value of the proffered evidence but also its tendency to confuse the jury. *Id.* at 322; Fed. R. Evid. 403. In light of the Court's admonition to consider the value of statistical evidence on a case-by-case basis, the fact that the statistical disparities in salaries paid Blacks and Asians were not legally significant during the relevant period, the fact that the statistical disparities in salaries paid Blacks and non-Blacks were not legally significant during the relevant period, and the statistical evidence regarding the petitioner's salary relative to a hypothetically, similarly situated Black faculty member, the district court did not abuse its discretion when it excluded the petitioner's statistical evidence on the § 1983 claims against Dr. Jenkins and Dr. Carson.

IV. THE PETITIONER'S CLAIM THAT THE LOWER COURTS DID NOT PROPERLY CONSIDER ALL THE EVIDENCE IN THIS CASE IS NOT AN ISSUE WHICH MERITS THIS COURT'S REVIEW.

The petitioner contends that the lower courts did not properly consider all the evidence of discrimination in the record and, therefore, they erred when they found that she failed to establish a prima facie case of race discrimination under either Title VII or § 1983. The petitioner's argument on this point ignores two crucial facts: (1) in order to prevail on any of her claims, she had to prove that the respondents discriminated against her in terms of her compensation during or after December 1979; and (2) in order to prove her § 1983 claims against Dr. Jenkins and Dr. Carson, she had to prove that they personally and intentionally denied her a higher salary because of her race after December 1979.

As noted above, the petitioner filed her EEOC charge in May 1980 and filed her complaint in December 1982. 42 U.S.C. § 2000e-5 requires persons alleging discrimination to file a charge with the EEOC within 180 days of the alleged discriminatory act. Under North Carolina law, plaintiffs must bring actions alleging violations of § 1983 within three years of the discriminatory action. N.C. Gen. Stat. § 1-52(5)(three year limitation on actions for "criminal conversion, or for any other injury to the personal rights of another, not arising on contract and not hereafter enumerated"; *Owens v. Okure*, 488 U.S. 235 (1989)(state's general or residual statute of limitation for personal injury actions applies to claims under § 1983). Consequently, petitioner was obligated to prove that the paychecks she received no earlier than December 1979 were the product of a deliberately discriminatory decision on the part of Dr. Jenkins or Dr. Carson or were a continuation of a previous discriminatory salary decision by ECSU. *See, United Air Lines v. Evans*, 431 U.S. 571 (1977)(female flight attendants who could not prove a discriminatory act within the requisite filing

period not entitled to relief even though effects of prior discriminatory discharges were perpetuated through the enforcement of a nondiscriminatory seniority system); *see also, Bazemore v. Friday*, 478 U.S. 385, 387 n.1 and 396 n.6 (1986)(victims of historically discriminatory salary schedules entitled to recover only if they can prove that discriminatory salary structure continued to a time within the applicable statute of limitations).

As the respondents have shown above, the statistical evidence was insufficient to create an inference that the respondents intentionally discriminated against the petitioner when setting her salary for December 1979. Furthermore, the petitioner failed to present evidence that any substantially similarly qualified Black faculty member was paid more than she was paid during or after December 1979.

The petitioner's testimony that Dr. Carson had told her that the "general policy of the administration is that they are going to get rid of all the Asians who are here at present" is neither an admission that Dr. Carson or Dr. Jenkins was personally involved in any effort to remove Asians from the ESCU faculty nor evidence that anyone was discriminating against Asian faculty in terms of their salaries. Furthermore, the record shows that after he became chairman Dr. Carson recommended the employment of two Asian faculty, Dr. Nizami and Dr. Naz, and recommended tenure for Dr. Naz and another Asian faculty member, Mr. Hafiz. Dr. Jenkins approved those recommendations and those Asians were hired and tenured. Finally, the record shows that the two highest paid regular faculty in petitioner's department were Dr. Nizami and Mr. Hafiz, both of whom were Asians.

The petitioner complains that the court of appeals did not give any consideration to evidence that, despite the fact that her husband, who was chairman of the Department of Biology, recommended the employment of Dr. Malik, an Asian, for a vacant position in the Department of Biology, Dr. Jenkins hired Dr. Lewis, a Black. The record, however, shows that Dr. Jenkins

hired Dr. Lewis only after Dr. Malik refused his offer to come to ECSU because he wanted more money. Although Dr. Lewis was employed at a salary higher than that advertised, there is no evidence in the record that Dr. Malik was not offered the same salary or that Dr. Malik would have accepted the position at the salary offered Dr. Lewis. Consequently, the evidence on this point also fails to create an inference of discrimination.

The petitioner claims that evidence that Evelyn Roberts, a Black faculty member in the Business and Economics Department, was promoted from Instructor to Assistant Professor while petitioner was denied a similar promotion proves that the respondents discriminated against her because of her race. The record, however, shows that after being hired Ms. Roberts attended the University of North Carolina at Greensboro, an accredited institution, where she completed thirty semester hours of study beyond her masters degree. (App. 19). After completing those courses in the summer of 1979, Ms. Roberts satisfied the minimum requirements for promotion and was promoted to Assistant Professor. (App. 6-7 and 19).

Ms. Roberts' record stands in sharp contrast with petitioner's. During the time she was employed at ECSU, the petitioner did not attend an accredited institution and made no effort to continue her education until 1976 when she enrolled in an unaccredited, correspondence Ph. D. program at California Western University. (App. 7). While enrolled in California Western University, Ms. Khan did not take thirty semester hours of study and, in fact, received academic credit for her "life experiences." (App. 7). Furthermore, Ms. Khan failed to provide the ECSU administration with an official transcript of her studies at California Western University until after she left ECSU. (App. 7). Without thirty semester hours of study beyond the masters degree, Ms. Khan did not qualify for promotion. (App. 6-7). Therefore, the fact that Ms. Roberts was promoted, while the petitioner was not, fails to raise an inference that the respondents discriminated against the petitioner because of her race.

Finally, the petitioner contends that the disparate treatment of Venus Deonanan, a Black faculty member, shows that Dr. Jenkins discriminated against her because of her race. Dr. Deonanan, who was not in the Business and Economics Department, was promoted from Instructor to Assistant Professor after attending Union Graduate University, an unaccredited graduate school. Union Graduate University was, however, a candidate for accreditation. The record also shows that candidacy status was a significant factor which distinguished Union Graduate University from institutions which were not candidates for accreditation. Furthermore, the record shows that Dr. Deonanan was promoted prior to the time Dr. Jenkins became Vice Chancellor and he played no role in that decision. Therefore, the decision to promote Dr. Deonanan does not raise an inference that any of the respondents discriminated against the petitioner.

Dr. Jenkins' subsequent decision to recommend Dr. Deonanan for tenure was based on the recommendation of her department chairman. Dr. Jenkins never received a recommendation that petitioner be tenured. Therefore, evidence regarding Dr. Deonanan's employment history fails to raise any inference of discrimination on the part of Dr. Jenkins and entirely fails to raise any inference that any respondent discriminated against the petitioner in terms of her salary.

When considered in its entirety, the evidence in the record fails to create a substantial probability that any of the respondents discriminated against the petitioner when setting her salary during the relevant period. Furthermore, a reading of the court of appeals' decision shows that it reviewed the evidence under the appropriate legal standards. The petitioner's disagreement with the lower courts' reading of the record does not raise a special or important issue that merits this court's review.

CONCLUSION

Insofar as the petitioner has failed to show that the decision below is in conflict with any applicable decision of this Court or any other circuit and has failed to show any other special or important reason for granting a writ of certiorari in this case, the respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

LACY H. THORNBURG
Attorney General

Thomas J. Ziko
Special Deputy Attorney General

N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7387
Attorneys for Respondents